



California Fair Political Practices Commission

March 15, 1990

Thomas S. Knox
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Post Office Box 2469
Sacramento, CA 95812-2469

Re: Your Request for Advice
Our File No. A-90-038

Dear Mr. Knox:

You are seeking advice on behalf of the California-Nevada Super Speed Ground Transportation Commission (the "Super Speed Commission"), a nonprofit corporation authorized under California and Nevada laws. You wish to know if the Super Speed Commission will be treated as a public agency for purposes of the Political Reform Act (the "Act").¹

The Commission's jurisdiction is limited to interpretation and enforcement of the Political Reform Act. (Section 83111.) Thus, this letter concerns only application of the Act to the Super Speed Commission, and does not concern application of other conflict-of-interest laws, such as Government Code Section 1090. We suggest that you contact the Attorney General's office for advice concerning Section 1090 or other laws outside of the Commission's jurisdiction.

QUESTIONS

1. Is the California-Nevada Super Speed Ground Transportation Commission a public agency within the meaning of the Act?
2. If so, are its members subject to the reporting and conflict-of-interest provisions of the Act?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSIONS

1. The California-Nevada Super Speed Ground Transportation Commission is a public agency within the meaning of the Act.
2. Members of the California delegation are subject to the reporting and conflict-of-interest provisions of the Act.

FACTS

According to the information that you have provided, the California-Nevada Super Speed Ground Transportation Commission was formed pursuant to authorizing legislation in California and Nevada.² The Super Speed Commission was formed to determine the feasibility of a super speed train connecting Las Vegas and Southern California. The Super Speed Commission is structured as a California nonprofit, public benefit corporation.

According to your letter, the authorizing legislation specifies that the Super Speed Commission (1) has no final authority to rule on plans for a super speed train, (2) cannot issue debt which would constitute an obligation of the State of California or the State of Nevada, (3) cannot obtain monies from California or any of its political subdivisions, (4) cannot adopt regulations binding on the public, and (5) has no powers of eminent domain.

You state that a number of groups and entities provided the impetus for forming the Commission, including the Nevada Resort Association; the Chamber of Commerce of Las Vegas; the City of Las Vegas; Clark County, Nevada; the Nevada Governor's Office; a German magnetic levitation company; a business group from Ontario; and a number of private citizens of Nevada and California. To date, these entities and individuals have provided most of the funding for the Commission. No funding has been received from the State of California or any of its political subdivisions.

The proposed super speed train would operate as a long-haul carrier. You indicate that long-haul transportation service has

² As originally structured, the authorizing legislation in California was enacted and ratified as a compact between California and Nevada. It created the Super Speed Commission to provide for the construction and operation of a super speed train between southern California and Las Vegas, Nevada. (Statutes of 1987, Chapter 1259.) This legislation was repealed by Chapter 149 of the Statutes of 1988. Chapter 149 enacted similar provisions as uncodified general law. These provisions created the Super Speed Commission, to be incorporated as a nonprofit California corporation. The full text of Chapter 149 is attached as Attachment "A".)

traditionally been planned, built and operated by the private sector.

You have provided a copy of a letter from the California Legislative Counsel which concludes that you are not a public entity for purposes of the Administrative Procedure Act. (Sections 11340-11356.) You have also provided a copy of a letter from the Public Employees Retirement System, concluding that the Super Speed Commission does not qualify as a public agency for purposes of the retirement system.

We have also reviewed the following supplemental documents received from you:

1. Relevant statutes of the State of Nevada, creating the Super Speed Commission and describing its powers;
2. Articles of incorporation, showing incorporation in California as of July 29, 1988;
3. Corporate bylaws.

ANALYSIS

In In re Siegel (3 FPPC Ops. 62, copy enclosed) the Commission set forth four criteria which should be considered when determining whether an entity is a public agency. In the Siegel opinion, the Commission determined that a nonprofit corporation formed to acquire, maintain and operate a water system was a local government agency under the Act. By contrast, in a later opinion, the Commission used the same criteria to determine that a downtown business association nonprofit corporation was not a government agency. (In re Leach (4 FPPC Ops. 48, copy enclosed.) The city contracted with the association to provide administrative services to a business promotion district formed by the city. The Leach opinion also applied the Siegel criteria to determine that a contract between the city and the chamber of commerce to operate a convention bureau did not result in the chamber of commerce becoming a government agency.

The criteria set forth in the Siegel opinion are:

(1) Whether the impetus for formation of the corporation originated with a government agency;

(2) Whether it is substantially funded by, or its primary source of funds is, a government agency;

(3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

(4) Whether the corporation is treated as a public entity by other statutory provisions.

Although the criteria in Siegel are helpful in determining whether an ostensibly private entity is truly public in nature, these criteria do not constitute a litmus test for determining whether an entity is public for purposes of the Act. (In re Vonk 6 FPPC Ops. 1, copy enclosed.) However, by applying the criteria set forth in Siegel against the background of the application of that criteria to the facts in Siegel and Leach, we can draw some conclusions with respect to the status of the Super Speed Commission.

1. Did the impetus for formation of the entity originate with a government agency?

In the Siegel opinion, the city council was intimately involved in the creation of the corporation in question. The idea for the corporation originated with the city council in accordance with the council's long-range plans. The corporation probably would not have been created were it not for the interest and involvement of the city council. (Siegel p. 65.) In Leach, both the business association and the chamber of commerce were in existence long before the contracts were entered into with the city and their primary purposes were unrelated to those contracts. (Leach p. 51.)

In this case, both the governments of Nevada and California were involved in the creation of the Super Speed Commission. While it may be, as indicated by your letter, that the seed for creation of the Super Speed Commission originated with the groups and entities mentioned, it is legislation of California and Nevada that made the Super Speed Commission a reality. Provisions of the California and Nevada implementing legislation provide for appointment of the governing body. The California law provides for the appointment of the California delegates by the Governor, the Senate Rules Committee and the Speaker of the Assembly, and imposes specific residency requirements on some of the delegates.

Based upon the foregoing, it is clear that the State of California is closely involved in the creation of the Super Speed Commission. Thus, the first criteria enunciated in Siegel is met.

2. Is the entity substantially funded by, or its primary source of funds a government agency?

In Siegel the city was a certain, continuing source of capital to the corporation. Furthermore, the city was viewed as, in essence, a guarantor of the indebtedness of the corporation. (Siegel, pp. 65-66.) In Leach the association and the chamber received their operating funds from private sources. The city provided only the amount of money necessary to reimburse the association and the chamber for their costs incurred in performing the contracted services. (Leach p. 51.)

Legislation creating the Super Speed Commission specifically provides that there is to be no public cost to the State of California or any of its political subdivisions, and that any debts of the Super Speed Commission shall not constitute obligations of either the State of Nevada or the State of California. The Commission is empowered to accept funds from the State of Nevada or its political subdivisions, the federal government and foreign governments. (Statutes of 1988, Chapter 149, Section 5 (c)(4) - (5).)³ However, there is nothing in the facts provided to indicate that such government funding is yet in place and it is not certain that a government agency will be the primary source of funding. Thus, the second criteria of Siegel is not met at this time.

3. Is one of the principal purposes for which it is formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

In Siegel the Commission determined that acquisition and operation of a water system is a service commonly provided by municipalities in their public capacities. (Siegel p. 66.) In Leach, promotion of the downtown business district, promotion of the city, and operation of the convention bureau were found to be activities performed equally by cities and nongovernmental entities. Additionally, the activities were viewed as specifically benefiting the downtown business area and retail stores, restaurants and hotels located throughout the city. They were therefore viewed as activities which were less public in nature than providing a public water supply. (Leach p. 51.)

You contend that the proposed superspeed train would be a long-haul carrier and that long-haul carriers are generally planned, built and operated by the private sector. We have previously advised that providing railroad service is a service which public agencies have traditionally performed. (Keene Advice Letter, No. I-89-613, copy enclosed.) The Super Speed Commission will select a proposed route, a proposed franchisee and proposed terminal sites (149-Section 5(c)(7)); will conduct impact and feasibility studies (149-Section 5(c)(1)); will evaluate technologies (149-Section 5(c)(2)); and will establish criteria for award of a franchisee (149-Section 5(c)(3)). These are functions which appear to be public in nature. Furthermore, the legislation creating the Super Speed Commission expressly states a declaration of intent of the States of California and Nevada to jointly pursue the development of a super speed train system, and lists a number of public purposes to be served by the system. (149-Section 2.)

³ Hereafter, sections of Chapter 149 will be prefaced by "149-" to distinguish them from citations to Government Code sections.

4. Is the entity treated as a public entity by other statutory provisions?

Information which you have provided from the Legislative Counsel and from the Public Employees Retirement System indicate that these entities do not consider the Super Speed Commission as a public entity. However, we have previously advised that it is not necessary to comply with all four criteria of Siegel in order to be considered a public agency. (Guiffre Advice Letter, No. A-89-66, copy enclosed.)

It should be noted that the legislation creating the Super Speed Commission itself reflects an intent to treat the resulting nonprofit corporation as a public entity in at least some respects. It expressly makes the Super Speed Commission subject to the open meeting laws in the manner "applicable to local governments." (149-Section 5(e).) It also provides for application of the conflict-of-interest provisions of the Act to the members who are California elected officers. (149-Section 5(f).)⁴

Application of the Political Reform Act.

The Super Speed Commission is somewhat unique in that it has been created by parallel action of both the State of California and the State of Nevada. As indicated above, the original legislation creating the Super Speed Commission would have created it as an interstate compact. (Statutes of 1987, Chapter 1259.) Certainly, if the Super Speed Commission had been established as a bi-state compact, the Act would not apply absent some specific authorizing provision in the compact. (People, Etc. v. City of South Lake Tahoe 466 F. Supp 527, 536-37; Satre Advice Letter, No. 76-346, copy enclosed.)

However, the Super Speed Commission was not created as a bi-state compact. While it might be argued that an analogy should be made between a bi-state compact and the joint action involved in this matter, we would conservatively advise that the Super Speed Commission should be treated as a public agency to which the Act applies. This interpretation better furthers the purpose of the

⁴ You have suggested that Chapter 149's specific application of the Act to the elected members of the California delegation should be viewed as added evidence that the agency was intended to be treated as a private entity rather than a public agency. In your view, reference to the Act implies that it would not otherwise apply to the Super Speed Commission. We disagree. If the Act would not otherwise apply, application by Chapter 149 would constitute an attempt to amend the Act. Conversely, if Chapter 149 intended to limit application of the Act by making it applicable only to elected officers, it would also constitute an attempt to amend the Act. Such an amendment would not be effective unless it satisfied the requirements of Section 81012, which sets forth the required procedure for amendment of the Act.

Act to provide appropriate disclosure by public officials and to avoid conflicts of interest. (Section 81002(c).)

The remaining issue is whether the members of the governing body of the Super Speed Commission are public officials under the Act. The term "public official" includes "members" of public agencies. (Section 82048; Regulation 18700, copy enclosed.) "Members" include salaried or unsalaried members of boards or commissions with decision-making authority. (Regulation 18700(a)(1). A board or commission has decision-making authority if:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may or may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Regulation 18700(a)(1)(A)-(C).

The legislation creating the Super Speed Commission gives it the power to conduct studies, evaluate alternative technologies, select a proposed route, establish criteria for and award a franchise and select a franchisee. (149-Section 5(c).) All of these powers enable the Super Speed Commission to significantly affect a variety of private financial interests, including real property and business interests. (See Sections 87100, 87103 and 87302.) While the overall plan and commencement of construction are subject to ratification by the State of California and the State of Nevada, the selection and award of the franchise are decisions exclusively of the Super Speed Commission. We think that this is sufficient to find that the Super Speed Commission has decision-making authority.

Therefore, the members of the Super Speed Commission who are members of the California delegation would be considered public officials for purposes of the Act. This would include all members of the California delegation and not just those members who are California elected officers.

The issue is less clear with respect to the members of the Nevada delegation. While those individuals are expressly made members of the Super Speed Commission by the terms of the California legislation (149-Section 4(b)(2)), they are appointed pursuant to Nevada law. Furthermore, it could be argued that they

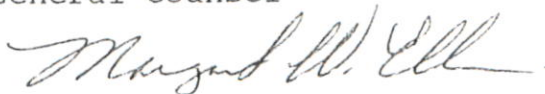
are sitting on the Super Speed Commission and making decisions solely upon the basis of the parallel Nevada laws which also create the Super Speed Commission. (Nev. Stats. 705.4293.) It is unlikely that the State of Nevada, in acting to establish the Super Speed Commission and appoint Nevada members, intended to subject the Nevada members to the Act. On balance, we believe that the Nevada members should not be treated as "public officials" under the Act.

As a public agency under the Act, the Super Speed Commission is required to adopt a conflict of interest code which sets forth appropriate financial disclosure categories for its members and any employees or consultants who engage in the decision-making process. (Section 87302.) This code must be submitted to the Commission for review and approval. (Section 87303, 82011(a).) Furthermore, the members, and any employees or consultants of the Super Speed Commission with decision-making authority, are required to disclose their economic interests and disqualify themselves from participating in decisions which would foreseeably and materially affect their economic interests, in a manner distinguishable from the effect on the public generally. (Sections 87100, 87103, and 87302.) If specific questions arise concerning the financial disclosure or disqualification obligations of officials of the Super Speed Commission, we are available to provide additional assistance. As stated previously, we also suggest that you contact the Attorney General's office for advice concerning Section 1090 or other laws outside the Commission's jurisdiction.

If you have questions regarding the above, you may contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Margaret W. Ellison
Counsel, Legal Division

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Enclosures